

Notification issues and s54 Insurance Contracts Act 1984 (Cth)

By Mark Brookes, Partner and
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Amongst the usual plethora of cases which deal with failures to notify, the two cases discussed in this newsletter illustrates the court's recent approach to both the construction of insurance contracts and the operation of s54(1) of the *Insurance Contracts Act 1984 (Cth)* (ICA). They specifically contemplate a situation where various policies might respond to a claim because of the period of time over which relevant events occur.

CGU -v- Corrections Corporation of Australia Staff Superannuation

The Full Federal Court appeal in the matter of, *CGU Insurance Limited -v- Corrections Corporation of Australia Staff Superannuation Pty Ltd* [2008] FCAFC 173, concerned an indemnity dispute involving three policies held by the insured, *Corrections Corporation of Australia Staff Superannuation Pty Ltd (CCAS)*.

CCAS was the trustee of an accumulative superannuation fund established for prison employees in Queensland, New South Wales and Victoria and was responsible for managing, administering and investing the fund. CCAS was insured at all material times by a professional risk insurance policy which prima facie responded to claims made against it by third parties.

Between November 1999 and January 2002 CCAS had taken out three such policies, which potentially responded to a claim arising from events during that period:

- a CGU policy valid from 12 November 1999 to 12 November 2000;
- a Chubb policy valid from 12 January 2000 to 12 January 2001; and
- a further Chubb policy valid from 12 January 2001 to 12 January 2002.

Those events were as follows:

- in 2000 CCAS was notified by its professional advisors that the fund assets were insufficiently

In Brief

- § Costly disputes between insurers and insureds can be avoided if insureds implement stringent protocols for notifying their insurers of potential claims.

By Mark Brookes, Partner

Insurance team recognised

Carter Newell's insurance team was this month recognised as one of **Brisbane's leading practice groups** in the *ALB Insurance State of the Market* article.

Carter Newell was one of the firms most talked about in Queensland. It had a loyal and longstanding client base...One client said the firm gave the 'whole 10 yards', took pride in the quality of its work and did everything that was expected. Paul Hopkins was professional, client focused and always tried to 'exceed' clients' expectations...Michael Gapes was 'extremely responsive'...Rebecca Stevens was responsive and able to grasp what they (clients) wanted quickly...Daniel Best settled matters early, rather than letting them 'drag on for years'...Patrick Mead was 'tremendous' in his service and knowledge...Mark Brookes was 'excellent' at handling liability matters, strategic and easy to deal with...

In addition Senior Partner, Paul Hopkins, was also recognised as one of Australia's 'Leading Lawyers'.

ALB Insurance State of the Market, ALB issue 7.4 pg 40 - 48, April 2009

diverse and 82% were held in real estate investments;

- subsequently that year, due to a number of correctional facility closures, many prison employees were made redundant and there was a sudden demand on the fund to make superannuation payouts;
- this led to a liquidity crisis and many of the former employees did not receive the superannuation benefits they had anticipated they were owed; and
- in April of 2002, applicants of the fund instituted proceedings against CCAS and its directors for breach of duty.

CCAS made claims under all three policies held during the relevant period, however all denied indemnity. Accordingly CCAS filed crossclaims against Chubb and CGU by which they sought their rights to indemnity under the policies.

Both the applicants' claim against CCAS and the crossclaim of CCAS against Chubb were settled in 2003. The proceeds received by CCAS from Chubb were insufficient to meet the settlement funds payable to the applicants. CCAS therefore pursued its crossclaim against CGU for the following amounts:

- \$275,000 being the settlement sum payable to the applicants;

- \$539,000 being liability for the applicants' costs; and
- \$500,000 being the balance of its costs of defending the applicants' proceedings.

The matter was heard at first instance by the Federal Court, which was required to determine whether the 1999/2000 CGU policy indemnified CCAS for the claim.

The policy was a 'claims made' policy under which CGU agreed to provide indemnity to CCAS and its directors for any "loss payment" they were obliged to pay

"arising out of any claim first made ...during the period of insurance and notified to the insurer during the indemnity period".

The *indemnity period* was the *policy period* plus 30 days.

As no claim had been made upon CCAS during that period by members of the fund, CCAS had not given notice to CGU of a potential claim.

Three issues were considered by the trial judge to determine the indemnity issue:

1. whether CCAS and its directors (as trustees of the fund) were, during the period of insurance, aware of any fact, situation or circumstances that might give rise to a claim;
2. whether the claims ultimately made arose out of any fact, situation or circumstance of which CCAS and its directors were aware; and
3. whether or not CCAS had given notice to CGU of any such fact, situation or circumstance during the indemnity period and, if they had not, whether they should be excused that omission by the operation of s54(1) of the ICA.

The court found that:

- during the indemnity period the directors of CCAS had the requisite awareness of circumstances that might give rise to a claim (either objectively or subjectively);
- a reasonable person knowing those facts would conclude that a claim of the type ultimately made by the members of the fund, may be made against CCAS; and
- CCAS's failure to notify within the indemnity period would not defeat its claim under the policy, by application of s54 of the ICA.

Accordingly the finding at first instance was that CCAS and its directors were entitled to the benefit of the 1999/2000 CGU policy, and they had established their loss for the purposes of making a claim under that policy.¹

Issues on appeal

CGU appealed to the Full Federal Court on the basis that the primary judge erred in holding that the claim arose out of a fact, situation or circumstance of which CCAS was aware during the period of insurance. CGU argued that cl 4.9 of the policy required not only awareness of a fact, situation or circumstance, but awareness that it might give rise to a claim of the kind that was in fact

made. Relying on this, they asserted that CCAS lacked awareness of the potential for the facts, situations and circumstances which existed during the period of insurance to give rise to the specific claims made by the applicants.

The court did not agree. It held that the language of cl 4.9 which referred to "*any claim which may subsequently arise*" indicated that the claim ultimately arising out of the fact, situation or circumstances did not have to correspond with a claim which CCAS thought might potentially arise.

The court also commented cl 4.9 would defeat its own purpose if it required not only awareness of circumstances, but also an understanding of the specific legal basis upon which liability would result.

As to CCAS's subjective awareness of circumstances giving rise to the claim, the court accepted the primary judge's findings that at least one of the directors had notice in September 2000, that two of the fund's properties had dropped significantly in value and that the fund faced a potential loss of 10% for the year. Accordingly the finding as to awareness was upheld.

CGU also appealed the trial judge's judgement on s54 of the ICA. It asserted that its basis for denying indemnity was not "*for reason only*" of CCAS's omission to give notice but because, more fundamentally the relevant *awareness of a fact, situation or circumstances* on the part of CCAS could not be established. However this argument was dependant on the court's approval of its earlier submission, that CCAS was not only required to be aware of the circumstances but also of their potential to give rise to the claim that was ultimately made. For this reason, that argument was rejected and accordingly the appeal was dismissed.

The Court of Appeal did not speculate what the outcome would have been had the requisite awareness on the part of CCAS not been established.

The question therefore remains: Is the operation of s54(1) limited, where the omission of the insured under the policy is not simply one of notification, but is coupled with something more fundamental, such as a lack of awareness of the potential for facts or circumstances to give rise to a claim?

Nonetheless, this case again highlights the importance of regular risk reviews by insureds and ensuring that notifications are made in accordance with policy terms.



Aussie Tax & Anor v Markel

A similar situation arose in *Aussie Tax Pty Ltd & Ronald Asquith v Markel Capital Ltd* [2008] VSC 592 which again concerned three different policies under which the plaintiffs sought indemnity.

The plaintiffs were sued in 2006, in respect of certain professional accountancy advice they provided between 2000 and 2001. The proceedings were ultimately settled between the parties in 2007 on the basis that the plaintiffs would pay to the claimants the sum of \$935,000.

The plaintiff's had held three professional indemnity policies which potentially indemnified them for this loss:

1. a GIO General Ltd policy from 30 September 1999 to 30 September 2000 GIO General Ltd (*1999 policy*);
2. a Lloyds' Insurance policy from 30 September 2000 to 30 September 2001 (*2000 policy*); and
3. a further Lloyds' Insurance policy from 30 September 2001 to 30 September 2002 (*2001 policy*).

All three policies were available to the plaintiffs as participants of a professional indemnity insurance scheme ("the Scheme") which was run by the Australian Society of Certified Practising Accountants.

In February 2002 the plaintiffs had notified the provider of the 2001 policy (the defendant to the proceedings) of a potential negligence claim, and later that same month submitted a formal claim for indemnity. This claim was denied and the plaintiffs subsequently brought proceedings in the Supreme Court of Victoria for a declaration that they were entitled to indemnity under the 2001 policy.

Valid notification had been made and all requirements of the insuring clause were satisfied, however indemnity was excluded under the 2001 policy on the basis that the insured knew of the circumstances giving rise to the claim, prior to the period of insurance.

The plaintiffs therefore relied on a *continuity provision*, which prima facie entitled them to indemnity under the policy providing no preceding policy (for example the 1999 policy) responded to the claim. The main issue for determination before the court was whether the plaintiffs were entitled to indemnity under either the 1999 policy or the 2000 policy, notwithstanding the respective insurers who provided those policies would not be bound by the court's findings.

It was the plaintiffs' argument that failure to notify under either the 1999 and 2000 policies would disentitle it to any claim for indemnity, thus making the defendant liable by virtue of the *continuity provision*. Not surprisingly, the defendant argued that the prior policies *did* respond, by virtue of s54 of the ICA, such that it was not liable.

The insuring clauses in both prior policies required that both

1. a claim be made upon the insured; and
2. the claim be reported to the insurer

within the period of insurance.

Neither requirement was met by the plaintiffs.

However a further provision in both policies, cl13, provided in familiar terms, that if the insured was both aware of circumstances giving rise to the claim and notified those circumstances during the period of insurance, the insurer would not be relieved of liability merely because a claim was not made against the insured during the period of insurance.

Accordingly, the court held the effect of cl13 was to treat the giving of notice of *circumstances* within the stipulated period as equivalent to giving notice of the *later made claim*. No arguments were raised by the parties with respect to this conclusion being consistent with the High Court decision in *FAI General Insurance Co Ltd v Australian Hospital Care Pty Ltd* [2001] HCA 38.

It was agreed by all parties that the first precondition to cl 13 was satisfied, as the plaintiffs were aware of the circumstances giving rise to the claim during the period of insurance. However the second precondition which required notification of those circumstances was not.

The court then turned to the application of s54(1) of the ICA, to preserve the plaintiffs' rights notwithstanding its omission to notify of circumstances under cl 13.

It was held that failure to notify was a relevant "act of the insured" for the purposes of s54 and that, but for s54, the policy would have the effect of denying indemnity by reason of that omission. No other basis for refusal to grant indemnity under the policy was suggested on the facts.

Accordingly the plaintiffs were held to be entitled to indemnity under both the 1999 and 2000 policies on the basis that by virtue of s54(1), insuring cl1 was engaged. Consequently proceedings against the insurer under the 2001 policy were dismissed.

Conclusion

The law on these issues and the application of s54 ICA is now fairly well settled, however there is still significant capacity for litigation given the variety of factual matrices that arise, dependent on the subjective and objective knowledge of insureds in the context of particular policy wordings.

Following on from the High Court decision in *CGU v Porterhouse* [2008] HCA 30 and Carter Newell's August 2008 newsletter on that case, these two cases are good examples of the importance of insureds and their brokers having in place regular risk reviews, to ensure prompt notification of claims and circumstances. Whilst the failure to do this is not necessarily always fatal to an entitlement to coverage, costly disputes and uncertainty can be avoided if appropriate steps are taken at an early stage.

¹ There was one component of the claim which was disputed on appeal, however it is not relevant to the scope of this article.

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Upcoming presentation...

Clayton Payne, Associate will be presenting a complimentary in-house seminar entitled "**Back to the Future? - The Fair Work Act 2009**" on Thursday 16 July 2009.



Clayton's presentation will address how the Rudd Government's reforms under the new "*Fair Work Act*" impact upon business and what is in store in relation to:

- awards;
- collective agreements;
- unfair dismissals; and
- the new "one stop shop" for workplace relations, known as "Fair Work Australia".

To register your interest, please contact Jaqueline Stephan on (07) 3000 8335 or via email at jstephan@carternewell.com.

Brisbane Law Firm of the Year Finalist - ALB Australasian Law Awards 2009

For the third year in a row, Carter Newell Lawyers has been named a finalist in the **ALB Australasian Law Awards – Brisbane Law Firm of the Year**. The firm won this award in 2008.

The awards which involve peer, client and industry leader nominations recognise outstanding client services as well as the ability to combine rigorous analysis with astute judgement and advice. Carter Newell was nominated alongside four other Brisbane firms.

The firm's mission is to deliver the best possible client service by seeking opportunities and finding solutions for our clients. This is only achieved through our team of passionate people, CN|One Team.

Carter Newell enjoys all the benefits of being a Brisbane firm and is proud to be a finalist in the ALB Australasian Law Awards 2009.



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